92-1035

Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Michael A. Slawek

Barbara A. Slawek

PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael A. Slawek,
Petitioner, Pro Se

Barbara A. Slawek,
Petitioner, Pro Se

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62 pp

QUESTIONS PRESENTED

Were the petitioners' rights violated under the due process clause of the Fifth Amendment when the tax court refused to grant an evidentary hearing on a complex scientific issue integral to understanding the issues even though the petitioners presented qualified expert witnesses and supporting documentation which were well within the scope and spirit of Federal Rules of Evidence 403, 702 and 703.

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NO.------

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

Michael A. Slawek

and

Barbara A. Slawek,

Petitioners

vs.

Commissioner of Internal Revenue,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Petitioners, Michael A. Slawek and Barbara A. Slawek respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Third Circuit refusing to remand a evidentary hearing.

OPINIONS BELOW

Memorandum and Opinion of U.S. Tax Court, Michael A. Slawek and Barbara A. *Slawek v. Commissioner of Internal* Revenue, T.C. Memo 1991-338, appears in Appendix A. Third Circuit Judgement Order, July 24, 1992 appears in Appendix B. Third Circuit Denial of Rehearing, August 24, 1992 appears in Appendix C. Final Tax Court Decision, November 20, 1991 appears in Appendix D. Motion to Reconsider Memorandum and Opinion, Denied, October 21, 1991 by rubber stamp. Appendix E.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on July 24, 1992. A timely Petition for Rehearing was filed on August 13, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on August 24, 1992 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. $ 1254 (1).

CONSTITUTIONAL AND OTHER PROVISIONS

Amendment V to the United States Constitution is set forth in Appendix F.

Federal Rules of Evidence

No. 403, 702, 703.

STATEMENT OF CASE

This appeal was filed under Rule 13 of the Federal Rules of Appellate Procedure and Rule 190 of the Rules of Practice and Procedure of the United States Tax Court. A rehearing was properly filed but denied.

On April 15, 1984 petitioners discharged dishonest accountants Thomas Schneider and James Monahan and hired accountant John Kowalski, to straighten out their books.

On December 24, 1984 a Notice of Audit was issued by the IRS upon the petitioners. After a lengthy, fruitless and perplexing investigation, delayed and interrupted for many reasons, unable to agree on an outcome, a Notice of Deficiency was issued April 15, 1987 for an astronomical, concocted figure, completely ignoring any resolution made in the extensive negotiations.

On January 11, 1988, the accountants Thomas Schneider and James Monahan,

were charged and later convicted for ignoring the rules of the IRS concerning other clients but not including the petitioners.

Unable again to effect a resolution, a trial was cancelled, jurisdiction transferred to another tax court and another trial set for Nov. 2, 1989.

A stipulation for the trial was signed seconds before court convened, under extreme circumstances. The stipulation was grossly in error and this was expressed to the court but ignored by the judge as well as the lawyers. In an unrelated study subsequent to the trial, petitioners discovered that the drug Tagamet and Librium on which petitioner, Michael A. Slawek, was on in heavy doses at the time of the signing of the stipulation, caused CNS disturbances which led to confusion, doubt, uncertainty and inability to make a decision based on free will. Petitioners submitted a timely motion on August 22, 1991 to reconsider

Memorandum and Opinion, with expert testimony that fully complied with the Federal Rules of Evidence, No. 403, 702, 703, additional documentation, testimony and trial transcript supporting the above conclusion were presented. A evidentary hearing was requested but denied. The Memorandum and Opinion merely glosses over this issue, does not give it the weight and credulousness it warranted. A letter from Smith, Kline and Beechan together with over fifty-one published studies of confusion with Tagamet (over two-hundred were collected but shortened for the sake of brevity). A letter from Martin Black, M.D., with a thirteen page curriculum vitae in this specific field of medicine and pharmacology. Dr. Black is the director of Temple University School of Medicine, Department of Pharmacology and Medicine, Chief of the Drug Liver Unit as well as a board certified gastroenterologist who published numerous scientific papers to the point at issue.

Many physicians and scientists offered to be an expert witness, since this confusion is well documented. This motion also contained an affidavit from John Kowalski, petitioner's accountant, clarifying some of the misinterpreted points of his testimony, when he was respondent's expert witness. The memorandum falls far short in communicating the serious nature and concern that this motion portrayed.

The IRS submitted a foreign return as a court exhibit, not one the petitioners filed or signed and based all calculations and court exhibits on this return. The court in return based its determination of negligence and penalties on these purely concocted figures. The IRS lied to the court in a motion when it said that the disputed return was the one sent by the petitioners. The IRS lied to the court when it said all records obtained from discovery were destroyed.

The justice department stated initially that they were working only with

court records in preparing for the appeal but petitioner, in reviewing the Supplementary Appendix prepared by the justice department for the Third Circuit, found heretofore unseen documents identified as Exhibit E of the trial, which in fact were not Exhibit E of the trial nor part of the records (this was confirmed by the Tax Court), and explains where the IRS obtained the foreign, unsigned, and unfiled tax return aforementioned. It is evident that they procured this return when Thomas Schneider and James Monahan's records were confiscated from their office.

REASONS FOR GRANTING THE WRIT

The court states it found the petitioner hard to believe. We believe the court did not follow the tier of evidence and used common sense not appropriate in this situation.

The court never met petitioner, Michael A. Slawek, had no baseline of demeanor from which to make judgements, was not present at the signing of the stipulation and was not adequately trained in recognizing the insidious manifestations of the drug's complex effects on the petitioner. Simply stated that the petitioner was not himself.

In Avary v. U.S. C.A.N.Y. 1962, 302, F. 2d 790,

> "it was held that the trial judge cannot arbitrary disregard expert testimony in record and rely on his unsubstantiated personal beliefs instead of on evidence."

In Franklin Supply Co. v. Tolman, C.A. Cal. 1971, 454 F. 2d 1059, the Court held that

> "when evidence from a professional is received, not contradicted and does not appear to doubt credibility or accuracy on inherit probability of opinion, that fact should be established."

Again, in Ridgles Est. v. U.S 1967, 180 Ct. Cl., 12220,

> "experts' opinion supported by facts, having a strong probative weight, may be given conclusive effect, particularly when not refuted or constricted or called in serious question, and should be evaluated in accordance with soundness and reality of reasoning."

Again, in U.S. v. Thompson, C.A. Ala. 1980, 615 F. 2d 329,

> "exclusion of evidence is not permitted when the judge does not find it creditable."

Again, in Breidon v. Sears, Roebuck and Co., C.A. Pa. 1983, 722 F. 2d 1134,

> "exclusion of expert testimony was an abuse of discretion."

Another case in point U.S. v. Pino, C.A.N.M. 1979, 606 F. 2d 908,

> **"the court was held wrong in preventing a hearing of testimony by an expert witness of how the effects of shock could mimic alcoholic intoxication."**

Based on these facts as well as the insidious nature of the drug Tagamet the tax court abused its discretion in not permitting an evidentary hearing. The court made a decision as to the creditability of the petitioner based on familiar and personal observation that could not possibly assess the magnitude of CNS disruption. Petitioner merely and rotely answered questions throughout the trial, however, when asked only once in the trial, to make a mathematical calculation, he was completely helpless. It is a common occurrence for people to recall things, yet forget a close acquaintance's name and at times to struggle with decisions that involve more complex mental processes. None of these three examples originate in the same neurological centers. At least the court

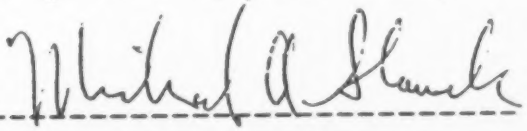
should have heard this eminent scientist, Martin Black, M.D., and then make an enlightened decision whether to exclude or include the testimony, by not doing so displayed a manifest abuse of discretion. Clearly in violation of the intent and spirt of the Federal Rules of Evidence 403, 702, 703. We are not questioning the court's broad area of discretion concerning expert testimony, only in specifically denying the hearing. This is the issue the Court of Appeals should have decided, now we are asking the Supreme Court.

CONCLUSION

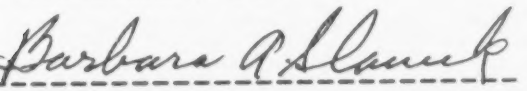
For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of Appeals in this matter.

DATED: November 23, 1992

Respectfully submitted,



Michael A. Slawek
Petitioner, Pro Se



Barbara A. Slawek
Petitioner, Pro Se

T.C. Memo 1991-338

UNITED STATES TAX COURT

MICHAEL A. SLAWEK AND BARBARA A. SLAWEK,
Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 21891-87.
Filed July 24, 1991

Michael A. Slawek and Barbara A., Slawek, pro se, and David J. Picker, for the petitioners.

Russell K. Stewart, for the respondent.

MEMORANDUM FINDINGS OF FACTS AND OPINION

COLVIN, Judge: The parties stipulated to deficiencies in income tax of $20,065 for 1982 and $45,272 for 1983. Petitioners seek to be relieved from their stipulation. They also argue reliance on accountants as a defense to respondent's determination of negligence, and contest the addition to tax for substantial understatement of income tax.

Respondent determined deficiencies and additions to tax as follows:

Appendix A

	Additions To Tax		
Year	Sec. 6653(a)(1) Deficiency	Sec.6653(a)(2)	Sec.6661
1982	$4,023	50% ofthe interest due on $80,459	-$20,115
1983	$3,783	50% ofthe interest due on $75,669	-$18,917

After concessions, the issues to be decided are:

1. Whether petitioners are bound by the stipulated deficiencies. We hold that they are.

2. Whether petitioners are liable for additions to tax for negligence under section 6653(a)(1) and (2). We hold that they are.

3. Whether petitioners are liable for additions to tax for substantial understatement of income tax under section 6661. We hold that they are.

All section references are to the Internal Revenue Code in effect for the

years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

All references to petition in the singular are to Michael A. Slawek. Petitioner Barbara A. Slawek will be referred to as Mrs. Slawek.

FINDINGS OF FACT

1. Petitioners

Petitioners are husband and wife who resided in Pennsylvania when they filed their petition in this case. Petitioner is a dentist. Petitioner also was a dental consultant for Fraternal Order of Police and Firefighters of Philadelphia where he generally spent half a day on Fridays. During 1982 and 1982 petitioner became involved in building a Montgomery Ward dental center in Catonsville, Maryland, about 150 miles from his home.

Mrs. Slawek is a housewife. She was not involved in the dental practice or in maintaining any records of the dental

practice or petitioner's investments. She was not trained in accounting or taxes.

Petitioners own real estate which produced rental income in 1982 and 1983. Petitioners were very busy with management of their real estate.

Petitioners, their 6 children ages 10 to 20, and a friend of one of the children resided at petitioners' home during 1982 and 1983.

2. The Dental Practice Finances

Petitioner had a vigorous dental practice as a sole practitioner. He worked 12 hours a day, 4 days a week, and a half day on Fridays. He was not involved in the daily bookkeeping operations of his dental practice but he had input regarding recording and payment of expenses. Susan Mako, the office bookkeeper, made deposits and disbursements. During 1982 through 1984, petitioner's father sometimes helped in an unpaid capacity with office bookkeeping,

including paying bills by check. Ms. Mako balanced the dental account bank statements. Petitioner's employees used his signature stamp to execute his checks. Petitioner's employees gave him cash receipts from his dental practice which he rarely deposited.

Both petitioners withdrew funds from the dental account for personal use through checks to cash. Petitioner never received a payroll check.

Petitioners co-mingled business and personal financial matters. Petitioner or his employees generally deposited receipts from his other business activities, such as rents and income from the Montgomery Ward dental practice, into his dental practice bank account. Petitioner or his employees paid expenses for maintenance, utilities, and similar items for his rental properties from his dental bank account. Petitioner occasionally deposited dental practice or other

investment receipts into other accounts.

3. Petitioners' Income Tax Returns and Accountants

Petitioners filed joint income tax returns for 1982 and 1983. They reported gross receipts of $488,742 for 1982 and $411,498 for 1983, and taxable income of $3,430 for 1982 and $5,541 for 1983. Petitioners claimed only one child as a dependent on each return.

Petitioner met Thomas Schneider, a certified public account, at a local Lions Club. Mr. Schneider and his partner, James Monahan, prepared petitioners' returns for 1982 and 1983. They subsequently pleaded guilty to conspiring to prepare false income tax returns for taxpayers other than petitioners.

Petitioners returns did not list rental expenses and income separately, only one dependent was claimed, and expenses were not itemized. Nearly all of the items on petitioners' 1982 and 1983

returns were changed in the calculation of the agreed deficiencies.

As directed by petitioner and his accountants, Ms. Mako and petitioner's staff gathered bank statements and other records to submit to the accountants for tax return preparation. she did not tell Messrs. Monahan and Schneider that the cash receipts from petitioner's dental practice were not deposited. Neither petitioner reviewed the returns before signing them.

In April 1984, petitioner showed his 1983 return to John Kowalski, a certified public accountant, and asked him if it was satisfactory. this occurred in a parking lot before petitioner retained Mr. Kowalski. Mr. Kowalski told petitioner that the return appeared to be fraudulent and that he should not file it. Despite Mr. Kowalski's advice, petitioner filed the return. Petitioner later hired Mr. Kowalski to represent him at the audit.

Mr. Kowalski did not know what instructions petitioner's office staff received from Messrs. Schneider and Monahan. As of April 1984, petitioner began relying on Mr. Kowalski to get his books. records, and financial matters in order.

Sometime in September 989, petitioner discharged Mr. Kowalski and hired Saul Bernstein, a certified public accountant. Mr. Bernstein had no knowledge of the information that Messrs. Monahan and Schneider used to prepare the returns at issue. He believed that petitioners' books and records for 1982 and 1983 were so incomplete and unorganized that an accountant could not prepare a return based on them.

Mrs. Slawek was not involved in the preparation of petitioners' tax return for 1982 and 1983.

4. Stipulation of Facts and Petitioner's Posttrial Motions

Before and during trial, petitioners were represented by David Picker, their attorney, and also assisted by Saul Bernstein, their accountant.

On May 23, 1988, at a previous trial session before another Division of this Court, the parties reported a basis for settlement and lodged an unsigned decision document for 1982 and 1983 with a deficiency that is considerably higher than those in the stipulation of facts now filed in this case. At that prior trial session Mr. Picker stated that it represented the agreement, but he was granted 30 days to have petitioner's accountants review the numbers. The decision document was not filed. On September 12, 1988, respondent filed a motion for entry of decision. Petitioners objected, alleging that the calculations were inaccurate. Respondent's motion was denied and the case was continued. The case was later assigned to this Division

of the Court.

Petitioner, Mr. Picker, and respondent's counsel drafted the stipulation of facts. Following extensive negotiations and consultations with attorneys and accountants, the parties agreed, as stated at paragraph four of the stipulation, to corrected taxable income and deficiencies for each of the years at issue. The agreed deficiencies were lump sum. Any assumptions upon which the agreement was based were not made a part of the record. The stipulation was agreed to and signed by petitioners and their attorney, Mr. Picker, and by attorneys for respondent. The stipulation was submitted to the Court. At trial Mr. Picker pointed out that petitioners' accountants arrived at slightly lower numbers for taxable income and deficiency in income tax for 1983. The changes were handwritten and initialled. The stipulation of facts and accompanying

exhibits were made a part of the record.

After trial, petitioners notified the Court that they had discharged Mr. Picker as their attorney and would proceed pro se. The Court ordered Mr. Picker withdrawn from further proceedings in this case.

Petitioners filed several motions after trial challenging the trial stipulation. The motions were:

a. A Motion to Vacate Stipulation of Facts. It alleged that the stipulation was signed under protest and severe duress. The motion sought to relieve petitioners from the stipulation.

b. A Motion for Reconsideration to Withdraw and Reform Stipulation of Fact and for Further Hearing and Reconsideration. In this motion petitioners alleged confusion due to lack of continuity of their accountants, mutual mistake in the stipulation of facts, and medical incompetency of petitioner due to

medication for his chronic ulcer.

c. A supplement to their motion for reconsideration. The supplement primarily addressed petitioners' version of their proper tax liability.

d. A Motion to Open the Record and submit New Evidence. It alleged that the 1982 return to which they stipulated and which was admitted into evidence was not the return they signed and filed in 1983.

e. A Motion to Dismiss Trial Due to Respondents (sic) Willful Suppression of Evidence and Willful Submission of Fraudulent Evidence Which Caused Undue and Severe Prejudice At All Levels of Negotiations and During the Trial and Furthermore Not the Least Precluded Petitioners Form Obtaining Justice. Petitioners alleged that this motion was based on new documentation and arguments, that the Form 1040 for 1982 was incorrect, and they sought to be relieved from their stipulated deficiencies. In support

of their motion, petitioners pointed to a copy of their 1982 Mercantile Tax Return filed with the City of Philadelphia that included parts of their Federal income tax return. All of these motions were opposed by respondent and denied by the Court.

OPINION

1. Relief From Stipulation of Facts and Posttrial Motions

At trial the parties filed a stipulation in which they agreed to deficiencies for the years at issue. After trial petitioners filed several motions primarily seeking relief from their stipulation. The motions were denied. We have again reviewed petitioners' motions and the entire record, and conclude that the stipulation should be enforced.

Generally, a stipulation of fact is controlling on the parties, and the Court

is bound to enforce it. Stamos v. Commissioner, 87 T.C. 1451, 1454 (1986); Rule 91. Rule 91 provides in part:

> (e) Binding Effect: A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. ***

Petitioners seek relief from the stipulation on grounds of mutual mistake. They assert that an incorrect return for 1982 as well as incorrect calculations were the basis for the stipulated deficiencies. Petitioners argue that they are seeking to establish the correct tax liability for both years.

The portion of the stipulation that petitioners seek to rescind contains a settlement of the deficiencies. Compromise and settlement of tax cases is governed by general principles of contract law. Korangy v. Commissioner, T.C. Memo.

1989-2, affd. 893 F.2d 69 (4th Cir. 1990); Quinones v. Commissioner, T.C. Memo. 1988-269; Himmelwright v. Commissioner, T.C. Memo. 1988-114. The considerations for the Court to take into account are akin to those for vacating a consent judgment, and the parties are held to their agreements without regard to whether the judgement is correct on the merits. Stamm International Corp. v. Commissioners, 90 T.C. 315, 321-322 (1988); Korangy v. Commissioner, supra.

Recision of consent decrees and settlements must be made carefully. As stated by the Supreme Court,

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed

> to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not be reference to what might satisfy the purposes of one of the parties to it. *** (Fn. ref.omitted.)

United States v. Armour & Co., 402 U.S. 673, 681-682 (1971).

Petitioners also claim that the 1982 income tax return, which is part of the record, is not the return that they filed. they claim that this return resulted in an erroneous agreement from which they are entitled to relief. We disagree. United States v. Armour & Co., supra; Stamm International Corp. v. Commissioner, supra. Petitioners also allege duress and coercion.

The parties have been through extensive negotiations prior to arriving at the stipulated deficiencies. They even reported settling this case at a trial session the year before this trial was held where the deficiencies were higher

and the settlement included additions to tax. Both sides consulted accountants and attorneys before agreeing to the deficiencies. We believe petitioners knew what was being settled and agreed with the settlement at the time. They were well represented, advised, and involved in the process. We do not believe their claim that they did not understand the agreement. We are also not convinced that there was duress and coercion.

If any mistake was made, it was not a mutual mistake. Even if there was, it was a unilateral mistake by petitioners for which they are not entitled to relief. See Stamm International Corp. v. Commissioner, supra at 322.

Finally, petitioners argue that justice requires relief from their agreement. We find nothing unconscionable or oppressive about enforcing the agreement. See Korangy v. Commissioner, supra.

In light of the foregoing, we hold that petitioners are not relieved from the deficiencies to which they agreed in the stipulation filed at trial. 2.

Negligence

Respondent determined negligence additions to tax under section 6653 (a)(1) and (2). Section 6653(a)(1) imposes an addition to tax of five percent of an underpayment of tax if any part of the underpayment is due to negligence or intentional disregard of the rules and regulations. In addition, section 6653(a)(2) imposes a further addition to tax of 50 percent of the interest payable on the portion of the underpayment attributable to negligence. Under section 6653(a), negligence is the lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances. Marcello v. Commissioner, 380 F2d 499, 506 (5th Cir. 1967); Neely v. Commissioner, 85 T.C. 934,

947 (1985). Petitioners bear the burden of proving that their underpayment of tax was not due to negligence. Luman v. Commissioner, 79 T.C. 846, 860-861 (1982); Bixby v. Commissioner, 58 T.C. 757, 791-792 (*1972); Soares v. Commissioner, 50T.C. 909, 914 (1968); Rule 142(a).

As a general rule, the duty of filing accurate returns cannot be avoided by placing responsibility on a tax returns preparer. Pritchett v. Commissioner,63 T.C. 149, 174 (1974); Enoch v. Commissioner, 57 T.C. 781, 802 (1972). Petitioners contend they are an exception to the general rule because they relied in good faith upon Monahan and Schneider, their certified public accountants.

Good faith reliance on the advice of counsel or a qualified accountant can, under certain circumstances, be a defense to the addition to tax for negligence. Pessin v. Commissioner, 59T.C. 473, 488-489 (1972); Conlorez Corp. v.

Commissioner, 51 T.C. 467, 475 (1968). However, we do not think this defense applies here for several reasons.

Petitioners did not check their returns. Taxpayers may be negligent where they signed their returns without checking them, even where the returns were prepared by an employee and checked by an accountant. Mackay v. Commissioner, 11 B.T.A. 69, 571, 574 (1928); Biederstadt v. Commissioner, T.C. Memo. 989-235; Myers v. Commissioner, T.C. Memo. 1980-437.

Petitioners blame their employees and accountants for their erroneous returns. It has long been held that taxpayers cannot escape their responsibility for a correct return by committing its preparation entirely to an employee or agent. Daugherty v. Commissioner, 78T.C. 623, 641 (1982); Leroy Jewelry Co. v. Commissioner, 36T.C. 443, 445 (1961); American Propeties, Inc. v. Commissionere,

28 T.C. 1100 (1957), affd. per curiam 262 F.2d 150 (9th Cir. 1958); Bailey v. Commissioner, 21 T.C. 678, 687 (1954); Estate of Briden v. Commissioner, 11 T.C. 1095, 1135 (1948), affd. sub nom. Kirk v. Commissioner, 179 F.2d 619 (1st Cir. 1950); Fisher v. Commissioner, 30 B.T.A. 433, 442-443 (1934).

The fact that the taxpayer was busy and delegated record-keeping duties to her did not excuse omission of income. Franklin v. Commissioner, 34 B.T.A. 927, 941 (1936); Board v. Commissioner, 14 B.T.A. 374, 393 (1928), remanded on other issues 51 F.2d. 73 (6th Cir. 1931).

Petitioners did not show what information they gave to their accounts and lawyers. See Samp v. Commissioner, T.C. Memo. 1981-706. All we know is that Ms. Mako provided the specific information requested. She did not provide information regarding cash receipts from the dental practice, which

were given to petitioners. We do not know what information petitioners' accountants had to prepare the returns. Mr. Bernstein testified that he did not believe it was possible for any accountant to prepare returns based on petitioners' 1982 and 1983 books and records. We have held taxpayers liable for additions to tax for negligence when they argued reliance on an attorney, accountant, tax adviser, or tax return preparer who prepared a return where we did not know what information the taxpayer gave to the adviser. Enoch v. Commissioner, supra at 803; Lester Lumber Co. v. Commissioner, 14 T.C. 255, 263 (1950).

Failure to ensure that the person preparing the return has all of the necessary information justifies imposition of the addition to tax for negligence. Daugherty v. Commissioner, supra at 640-641; Ma-Tran Corp. v. commissioner, 70 T.C. 158, 173 (1978).

Thus, notwithstanding the fact that petitioners' tax preparers pleaded guilty to preparing false returns for taxpayers other than petitioners, we find ample ground to support our finding. Petitioners have failed to carry their burden of convincing us otherwise.

3. Substantial Understatement of Income Tax

Respondent determined additions to tax for substantial understatement of income tax under section 6661. Section 6661 imposes an addition to tax when there is a substantial understatement of income tax for a taxable year. Sec. 6661(a). A substantial understatement exists if the amount of the understatement exceeds the greater of 10 percent of the amount required to be shown on the return or $5,000. Sec. 6661(b)(1). An understatement, for purposes of this addition to tax, is the amount by which

the amount required to be shown on the return. Sec. 6661(b)(2); Tweeddale v. Commissioner, 92 T.C. 501 (1989); Woods v. Commissioner, 91 T.C. 88 (1988).

Petitioners appear to argue that the tax rate under this section is 10 percent. We disagree. The appropriate percentage rate is 25 percent. Pallottini v. Commissioner, 90 T.C. 498 (1988). Petitioners do not claim they are eligible for the exceptions of substantial authority under section 666(b)(2)(B)(i), or adequate disclosure under section 6661(b)(2)(B)(ii). Accordingly, we sustain respondent's determination as to this issue using the 25-percent rate.

In light of the foregoing,

Decision will be entered under Rule 155.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-7098

MICHAEL A. SLAWEK: BARBARA A. SLAWEK,
APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE

On Appeal from the United States Tax Court
(Tax Court Civil No. 87-21891)
Judge: Hon. John O. Colvin

Submitted Under Third Circuit Rule 12(6)
July 24, 1992

Before: SLOVITER, Chief Judge, HUTCHINSON
and ROTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the United States Tax Court be and is hereby affirmed. Costs taxed against appellants.

By the Court,
(signed) SLOVITER

Chief Judge

Attest:
(signed) Sally Mrvos

Sally Mrvos, Clerk
Dated: Jul 30, 1992

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-7098

MICHAEL A. SLAWEK and BARBARA A. SLAWEK
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

The petition for rehearing filed by Appellants Michael A. Slawek and Barbara A. Slawek in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court
(signed) SLOVITER
Chief Judge

Dated: Aug. 24, 1992

Appendix C

UNITED STATES TAX COURT

MICHAEL A. SLAWEK and	)	
BARBARA A. SLAWEK,	)	
Petitioners,	)	
v.	)	Docket
COMMISSIONER OF INTERNAL	)	No. 21891-87
REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion or the Court filed July 24, 1991, it is

ORDER AND DECIDED: That there are deficiencies in income tax due from the petitioners for their taxable years 1982 and 1983 in the amounts of $19,537.00 and $44,420.00, respectively; and

That there are additions to tax due from the petitioners for the taxable years 1982 and 1983 under the provisions of I.R.C. 6653(a)(1) in the amounts of $977.00 and $2,230.00, respectively; and

That there are additions to the tax

due from the petitions for their taxable year 1982 and 1983 under the provisions of I.R.C. 6653(a)(2), in amounts equal to 50 percent of the statutory interest due on $19,537.00 from April 15, 1983, and on $44,420.00 from April 15, 1984, respectively, to the dates of the assessment of the tax, or, if earlier, the dates of payment; and

That there are additions to the tax due from the petitioners for the taxable years 1982 and 1983 under the provisions of I.R.C. 6661 in the amounts of $4,884.00 and $11,151.00, respectively.

(Signed) John O. Colvin

Judge.

Entered: Nov. 20, 1991

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UNITED STATES TAX COURT

MICHAEL A. SLAWEK and BARBARA A. SLAWEK,	]
Petitioners,	]
v.	] Docket No. 21891-87
COMMISSIONER OF INTERNAL REVENUE,	]
Respondent.	]

MOTION TO VACATE DECISION OF NOV. 20, 1991

This decision was based on a stipulation of fact which was inadvertently signed by the petitioner, Michael A. Slawek, who was on heavy doses of Tagamet and Librium which caused mental incapacity and consequently contains many mistakes and omissions. The enforcement of this decision would oblige the petitioners to pay approximately

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/----------/
/U.S. TAX COURT /
/ DENIED /
/JAN 8 1992 /
(signed) /John O. Colvin- Judge/
/----------/

Appendix E

$130,000.00 over and above the approximate $105,000.00 they may owe. This liability would create financial havoc and disaster in their family especially in these difficult economic times.

The Court is not bound to enforce this stipulation. A stipulation based on a mistake whether unilateral or mutual, may be rescinded under Federal Law. Resolution is expressed in Restatement of Contracts.

In GAMEWELL MANUFACTURING, INC., a corporation, Appellant, v. HVAC SUPPLY, INC., and Aeronca, Inc., Appellees. No. 82-1533. United States Court of Appeals. Fourth Circuit.

A stipulation based on an error by a third party was rescinded.

In REO MOTORS, INC., Petitioner v. COMMISSIONER OF INTERNAL REVENUE, CA-655-1 USTC 49090 Respondent.

A stipulation based on a mistake by an accountant was rescinded.

In BRAST v. WINDING GULF COLLIERY CO., 94 F2D 179 (4th Cir. 1938).
A stipulation based on a unilateral error was rescinded.

Circuit Judge Stahl maintains in - BENJ. A. STRATMORE & HELEN STRATMORE v. U.S. OF AMERICA, Defendant-Appellant. No. 17786. U.S. Court of Appeals Third Circuit, "that a stipulation is entered into by both parties for a mutual convenience and to expedite the disposition of the litigation and shall not be given any greater effect than that intended". He further states, "I believe the appellee should be afforded an opportunity to be relieved of a stipulation clearly insufficient and improvident".

He continues to argue that in this case - "to enforce the stipulation would give the government a windfall profit that it is not entitled to. He cites: KNIGHT NEWSPAPERS v. COMMISSIONER OF INTERNAL

REVENUE, 143 F.2d 1007 (6th Cir. 1944). BOSTON EDISON CO. v. CAMPANELLA & CARDI CONSTRUCTION CO., 272 F2d 430 (1st Cir. 1959). AETNA LIFE INSURANCE CO. v. BARNES, 361 F.2d 685 (5th Cir. 1966).

In BRAST v. WINDING GULF COLLIERY CO., Circuit Judge Stahl points out that "where facts were developed to show that a stipulation was inadvertently signed, the part may be relieved if there is no prejudice to the opposite party", furthermore, the government collected taxes which it had no right to collect, no prejudice was suffered by the government since it was not entitled to the money in the first place".

Petitioners believe this Court recognizes that a mistake was made, whether it was unilateral or mutual is immaterial.

By enforcing this stipulation where the Court is given considerable discretion to rescind it in the interest of justice,

the Court is placed in the unenviable position to uphold contractual law, at the same time denying the petitioners their constitutional rights. By upholding the stipulation, which has several damaging mistakes, the Court is allowing the IRS to collect taxes on fabricated income, clearly in violation of the "due process provision" protected by OUR CONSTITUTION OF THE UNITED STATES.

This stipulation is wrong in several areas:

1. It stipulates to a 1982 1040 that was not filed by the petitioners. This seriously distorts the proceedings and outcome of the trial.

2. It is deficient in over $20,000.00 of payroll deductions and $38,000.00 of depreciation and other expenses, all of which were inadvertently excluded and very readily demonstrable.

3. These correct adjustments are not offset by any concessions by the IRS which

were merely superficial in dollar amounts.

The difference in liability (tax, penalty and interest) amounts to over a 130% increase - ($250,000.00 computed today which is wrongly assessed as opposed to the petitioners true liability of $105,000.00). See accountant's, (John Kowalski, CPA), certified calculations and affidavit addressing the subject. Exhibit Z-1.

The day before the trial, negotiations between the IRS and the petitioners accountant commenced. At the end of the session two numbers were formulated, because of vagueness and uncertainty the petitioners did not sign that agreement at that time. That very night petitioner, Michael A. Slawek, discovered the payroll error. The next morning a hasty meeting was called, minutes before the trial was to commence, this issue was brought up, which was not on the bargaining table the night before.

District council refused to entertain it and in the midst of threats and impending doom (which might have been puffery), district council dramatically left the meeting, claiming he was insulted by petitioners' accountant. At the same time petitioners' lawyer and accountant said they were not prepared to try the issues and consequently the petitioner was abandoned, alone and frightened. Petitioner, Michael A. Slawek, was confused and unsure what to do, as well as being on heavy doses of Tagamet and Librium he reluctantly agreed to sign the stipulation.

This reluctance and protest was made known to district council at the signing of the stipulation, which district council subsequently denied.

Petitioners ask, is it possible for the Court to make a determination of finding of fact as to the petitioner's mental capacities at the time of signing

of the stipulation, at which time the Court was not present and did not observe the events which immediately preceded the Court's commencement.

A case in point - petitioner's father, Joseph Slawek, an electrical engineer, almost completely recovered from a stroke with one exception - due to heavy medication, his ability to comprehend, recall and calculate numbers was totally lost, yet in Court he was a credible witness. (TR. 31-35).

The Tagamet and Librium issue was fully explored and documented in previous motions. The petitioner at the time of signing the stipulation had no explanation for his behavior only to realize that after six years of fighting with the IRS and staying awake all night to prepare for the trial, he, completely out of character, gave up. A glitch or window into the petitioner's mental state can be observed in the transcript when he had

much difficulty computing a simple mathematical problem. (TR. 106 - L. 10-13). $13,000.00 minus $12,500.00 divided by 5 is not 2,000 by $100.00. Petitioners believe the combined effects of Tagamet and Librium weakened his mental capacity to make a decision based on free will.

Also submitted to the Court were four affidavits denying the validity of the 1982 1040 that was stipulated to. Petitioners produced a photostat copy of the true 1982 1040 as well as corroborating evidence which consisted of a cancelled check from the City of Philadelphia for the appropriate taxes based on the true 1982 1040.

No injustice, damage or prejudice would be suffered by the respondents since the tax imposed is not supported by the true calculations. If corrected they would received what they are entitled to - not the $250,000.00.

In support of the Tagamet issue,

petitioner points out that he had previous damaging side effects from the drug Tagamet. Exhibit Z-2.

Petitioner is still disturbed in the government's handling of his request for the true 1982 1040. He received vague and conflicting responses several times. Exhibit Z-3 and Z-4. As early as last week the Photo Copy Unit of the IRS informed his that Audit had the 1982 return and not returned it. There was no indication that it was destroyed. When asked for this information in writing which was previously requested under the Freedom of Information Act, the employee was informed by his supervisor not to send it to the petitioners, and they were not permitted to further discuss the subject.

Petitioners pray that the Court see these injustices and that at least permit the stipulation to be reformulated.

(signed) ----------
Michael A. Slawek,
Petitioner

(signed) ----------
Barbara A. Slawek,
Petitioner

Date: December 19, 1991

cc: R. Stewart

Exhibits: Z-1, Z-2, Z-3, Z-4

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Appendix F